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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KIRK JAMES RENSHAW, Defendant and Appellant.	H044418 & H043421 (Santa Clara County Super. Ct. No. C1504844)

Defendant Kirk James Renshaw moved unsuccessfully to suppress the results of a warrantless blood alcohol test performed after he was arrested on suspicion of driving under the influence of alcohol. Defendant argues on appeal that his consent to the blood test was involuntary in violation of the United States Constitution because, among other things, the arresting officer did not read him the admonitions from the implied consent law. Reviewing the totality of the circumstances, we will find the consent was voluntary. We will modify the judgment to correct two conceded sentencing errors and will affirm the judgment as modified.

I. TRIAL COURT PROCEEDINGS

Defendant was charged by felony information with driving under the influence of alcohol with a prior felony DUI conviction (Veh. Code, §§ 23152, 23550.5, subd. (a); count 1); driving under the influence of alcohol with a blood alcohol level over 0.08 percent and a prior felony DUI conviction (Veh. Code, §§ 23152, 23550.5, subd. (a); count 2); driving with a suspended or revoked license as a result of a DUI conviction

(Veh. Code, § 14601.2, subd. (a); count 3); and driving with knowledge of a suspended or revoked license that was suspended or revoked under Vehicle Code section 13353.2 (Veh. Code, § 14601.5, subd. (a); count 4). The information alleged two prior strike convictions (Pen. Code, § 667.5, subds. (b)–(i)) and three prior prison terms (Pen. Code, § 667.5, subd. (b)).

A. SUPPRESSION HEARING

According to testimony from the arresting officer at the suppression hearing, he was dispatched to the scene of an accident in San Jose involving a single motorcycle, with first responders already on scene when he arrived. It was a clear, dry night, and there was light traffic on the street. A motorcycle was in the road, defendant was lying face down about 50 feet down the street from the motorcycle, and his helmet was about 100 feet still farther down the street. The officer was not sure if defendant was alive when he first arrived. Defendant was bloody and had difficulty moving one of his arms. Defendant had abrasions on his mouth and face and injuries consistent with having crashed the motorcycle. Defendant was able to give his name and date of birth, was generally responsive to questioning, and confirmed that he had crashed the motorcycle. The officer suspected defendant had been driving under the influence of alcohol because he had bloodshot watery eyes, slurred speech, and smelled like alcohol. The officer followed defendant's ambulance to the hospital.

Defendant received primary care and a CT scan. The officer then placed him under arrest on suspicion of driving under the influence of alcohol. The officer read defendant his *Miranda* rights, and defendant indicated he was willing to talk to the officer. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Defendant was responsive to the officer's questions and did not appear dazed or confused. The officer "asked [defendant] if he would give a blood sample." The officer explained at the suppression hearing that he informed defendant that because he was "under arrest for driving under the influence [the officer] needed to take a sample, and [the officer] asked him if he would give a blood

sample." (In response to a later question from the trial court about whether the officer told defendant he "needed" a blood sample, the officer clarified that he "told him I wanted him to give me a blood sample.") When asked at the suppression hearing why he did not admonish defendant about the "negative implications of refusing a blood draw," the officer responded that he did not think any admonition was necessary "[b]ecause he didn't refuse." Defendant did not resist the blood draw, either physically or verbally.

The officer acknowledged on cross-examination that in cases where a DUI suspect is injured it can sometimes be difficult to distinguish whether the driver's disorientation is caused by the alcohol or by the injury. The officer also acknowledged that the story defendant provided at the hospital about the source of his injuries differed from the story defendant provided at the scene of the accident. He related at the hospital that he had been injured at work, which the officer thought was odd given the physical evidence at the accident scene. Defendant had also told the officer that the paramedics found him at the intersection of two streets even though those two streets actually run parallel. The officer testified that he believed defendant was lying to him about the circumstances of the accident, and did not think that the inconsistent answers were the result of defendant being confused. The officer confirmed that it appeared defendant was in pain while he was asking him questions.

The trial court denied the motion to suppress, finding defendant had voluntarily consented to the blood test. The court reasoned that defendant was conscious and appeared to understand what was happening; the medical treatment he was receiving was not so intrusive as to interfere with his ability to respond to the officer's questions; and the officer asked for (rather than demanded) a blood sample. The court credited the officer's testimony that it seemed as though "there was some amount of evasion or avoidance or perhaps even lying in the questions and answers that were not responsive." The court also credited the officer's testimony that he asked for a blood sample rather than demanding one, and the court noted a difference between an officer saying

"something to the effect of, 'I need a blood sample,' as opposed to asking the question whether he was willing to give consent." Defendant appealed the denial of the suppression motion, leading to case No. H043421.

B. PLEA AND SENTENCING

Following the denial of his suppression motion, defendant pleaded no contest to the four charged counts, and admitted the special allegations. Defendant filed a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, which the court denied. Defendant was sentenced to five years in prison, consisting of: a two-year middle term for count 1 (Veh. Code, §§ 23152, 23550.5, subd. (a); Pen. Code, § 1170, subd. (h)(1)), doubled because of the prior strike conviction (Pen. Code, § 667, subds. (b)–(i)); and one year for one prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). The trial court imposed a four-year sentence for count 2 (Veh. Code, §§ 23152, 23550.5, subd. (a)), which it stayed under Penal Code section 654; imposed concurrent six-month sentences for counts 3 and 4 (Veh. Code, §§ 14601.2, subd. (a), 14601.5, subd. (a)); and struck the punishment for the remaining two prior prison term enhancements (Pen. Code, §§ 667.5, subd. (b), 1385). (As we will discuss, the sentencing minute order and abstract of judgment state inaccurately that the sentence for the second felony would run concurrent.) Defendant appealed from the judgment (case No. H044418), and we ordered the two appeals to be considered together.

II. DISCUSSION

A. VOLUNTARINESS OF DEFENDANT'S CONSENT TO THE BLOOD DRAW

1. Standard of Review

The Fourth Amendment to the United States Constitution prohibits unreasonable searches, and taking a blood sample is a search for Fourth Amendment purposes. (*Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160, 2173].) A warrant supported by probable cause is generally necessary before a search may occur. (*People v. Balov* (2018) 23 Cal.App.5th 696, 700 (*Balov*).) Consent is one exception to the warrant

requirement. "It is well established that a *consensual* search does not violate the Fourth Amendment 'because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.' " (*Id.* at pp. 700–701.) But consent must be voluntary, and the prosecution has the burden of proving that consent was freely and voluntarily given. (*People v. Harris* (2015) 234 Cal.App.4th 671, 689–690 (*Harris*).) Mere submission to a claim of lawful authority will not satisfy the prosecution's burden. (*Ibid.*) Determining whether consent to a search was voluntary requires analyzing the totality of the circumstances surrounding the consent. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 (*Schneckloth*).)

We are limited in our review of a trial court's finding that consent was voluntary in the context of a motion to suppress evidence from a warrantless search. The " 'voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, "The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence." ' " (*People v. Monterroso* (2004) 34 Cal.4th 743, 758 (*Monterroso*).) Though we accept the trial court's factual findings that are supported by substantial evidence, we review de novo the legal question of whether under the totality of the circumstances the defendant's consent was voluntary. (*Balov*, *supra*, 23 Cal.App.5th at p. 700.)

2. Consent was Voluntary Under the Totality of the Circumstances

The parties generally agree about the factual circumstances of the case as determined by the trial court. Defendant appeared injured and intoxicated at the scene of a traffic accident. An ambulance transported him to a hospital (followed by the officer who had responded to the accident), where defendant received treatment that included a CT scan. The officer was present during defendant's initial treatment, and defendant was

placed under arrest at the hospital. Defendant waived his *Miranda* rights and talked with the officer. The officer asked defendant to provide a blood sample, and defendant affirmatively consented. Defendant did not resist, verbally or physically, when medical staff drew blood. Defendant's explanation for how he sustained his injuries changed markedly between his statements at the accident scene and his statements at the hospital. The officer believed that defendant was lying to him and was not confused about the questions. Defendant appeared to be in pain, but not dazed or confused, when the officer was questioning him.

Defendant challenges the court's factual finding that he was coherent when asked to allow the blood draw. He argues the trial court's finding that he was coherent lacks evidentiary support because defendant gave "nonsensical answers and fail[ed] to respond to at least one question." But the trial court was entitled to credit the officer's testimony that defendant did not appear dazed or confused and that the officer attributed defendant's changing answers to lying rather than to the effects of his injuries. The court's conclusion that defendant was coherent implies a credibility determination in favor of the officer, which we must accept on appeal. (*Monterroso, supra*, 34 Cal.4th at p. 758.)

On the facts as found by the trial court, we find that defendant knowingly and voluntarily consented to the blood draw. The trial court relied on the officer's testimony that he requested—rather than demanded—that defendant provide a blood sample. A request implies that defendant had a choice whereas a response to a demand would suggest an involuntary submission to a claim of lawful authority. We therefore disagree with defendant's contention that the semantic distinction "carries no weight in the analysis." Defendant also affirmatively provided consent for the blood draw, suggesting active and voluntary consent. Defendant gave his consent at a hospital, which is a less inherently coercive environment than a police station. (Defendant's argument that the hospital was as coercive as a police station merely because the officer had followed

defendant's ambulance to the hospital is unpersuasive.) Defendant appeared coherent when asked questions at the hospital, which also supports voluntariness. We acknowledge that certain factors defendant identifies might support a finding that his consent was involuntary if considered in isolation, but they must be considered with the totality of the circumstances.

Defendant argues his case is factually similar to others where courts have found consent to blood-alcohol testing involuntary, but they all involved facts not present here that tipped the balance of the totality-of-circumstances analysis. (Citing *People v. Ling* (2017) 15 Cal.App.5th Supp. 1 (*Ling*); *People v. Mason* (2016) 8 Cal.App.5th Supp. 11 (*Mason*).) *Ling* involved an arrest following a traffic stop and failed field sobriety tests. (*Ling*, at p. 5.) The arresting officer placed Ling in a patrol car and told him that because " 'you're under arrest for DUI, you have to submit to a chemical test, which is a test of either your breath or your blood.' " (*Id.* at p. 6.) Ling was taken to a California Highway Patrol station where the only type of test available was a blood test. Ling allowed the blood draw to occur, but never affirmatively agreed to any type of testing. In finding no voluntary consent, the *Ling* court focused on the lack of affirmative consent, concluding that Ling merely "submitted to a blood draw and that this submission was due to the officer's expression of lawful authority." (*Id.* at p. 8.)

Ling is distinguishable, as defendant here did affirmatively agree to the blood draw. He did so in response to a request rather than a demand from the officer, as the trial court found. And the interaction occurred at a hospital, which is less inherently coercive than the patrol car and police station involved in *Ling*.

Similarly distinguishable is *Mason*, which also involved an arrest following a traffic stop and failed field sobriety tests. (*Mason, supra*, 8 Cal.App.5th Supp. at pp. 15–16.) Mason was handcuffed and taken to a secure law enforcement facility. (*Id.* at p. 16.) An officer told Mason "she was required to give" a blood or breath sample. Mason agreed to a blood draw. (*Id.* at pp. 16–17.) Finding Mason's consent involuntary, the

Mason court focused mainly on two circumstances: she "was not asked for her permission to conduct a chemical test, nor was she advised of any of her rights concerning it—rather, she was informed that she *must* submit to a blood or breath procedure"; and the interaction occurred at a "secure law enforcement facility." (*Id.* at p. 32.)

Our decision is also consistent with the recent decision in *Balov*, *supra*, 23 Cal.App.5th 696. Following a traffic stop and arrest on suspicion of DUI, an officer informed Balov (apparently while Balov was in a patrol car) " 'that per California law he was required to submit to a chemical test, either a breath or a blood test.' " (*Id.* at p. 699.) The officer did not inform Balov of the statutory consequences of refusing testing. Balov elected a blood test and submitted to that test. In rejecting Balov's argument on appeal that his consent was involuntary, the *Balov* court noted that "by the act of driving on California's roads, Balov accepted the condition of implied, advance consent [to blood or breath testing] if lawfully arrested for drunk driving." (*Id.* at p. 702.) Though that advance consent could have been withdrawn at the time of arrest had Balov refused testing, his consent after arrest reaffirmed the implied consent. The court noted that the officer telling Balov he was required to submit to chemical testing was not inaccurate because "[Vehicle Code section] 23612 required Balov to submit to a chemical test" or else "face[] the consequences specified under the consent law including a fine, the loss of his driver's license, and mandatory imprisonment if convicted of driving under the influence." (*Balov*, at p. 703.) The court found no evidence that the officer intended to deceive Balov by providing an incomplete admonition. Finally, the court reasoned that "failure to communicate the consequences of refusing a chemical test did not make [the officer's] statement any more or less coercive than if the information had been provided" because in "neither case is the driver advised of his or her right to refuse to test altogether." (*Id.* at p. 704.)

Defendant argues his intoxication weighs against a finding of consent. As the federal authority he cites makes clear, the "mere fact that an individual is intoxicated does not render consent involuntary"; it is "simply another factor to be taken in consideration when assessing the totality of the circumstances." (*U.S. v. Scheets* (7th Cir. 1999) 188 F.3d 829, 839.) And there was no evidence presented that defendant was so intoxicated at the hospital that he was unable to voluntarily consent to the blood draw. The officer testified that defendant appeared intoxicated at the accident scene, but also that defendant appeared to understand the questioning that occurred both at the accident scene and at the hospital 20 to 40 minutes later.

Defendant contends his "quick, verbal authorization cannot constitute knowing – and, by extension, voluntary – consent since he did not know he had the legal right to refuse." Defendant cites *Schneckloth*, but his argument is similar to one the *Schneckloth* court itself rejected. *Schneckloth* disagreed with the approach adopted by the Ninth Circuit Court of Appeals under which the prosecution would have the burden to "affirmatively prove that the subject of the search knew that he had a right to refuse consent." (*Schneckloth*, *supra*, 412 U.S. at p. 229.) The Supreme Court reasoned that such a burden would be difficult to meet in most cases because "[a]ny defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent." (*Id.* at p. 230.) As to the speed with which defendant here consented to the blood draw, defendant points to no authority to support an argument that how quickly one provides consent will affect its voluntariness.

Defendant discusses the officer's failure to obtain "medical clearance" before questioning him. But defendant does not explain what medical clearance he would have liked the officer to obtain, nor does he point to anything defining that phrase. The officer testified that he was allowed to question defendant without obtaining clearance from

anyone. The medical clearance line of questioning at the suppression hearing was irrelevant in the absence of more information.

Defendant relies on an opinion from the Iowa Supreme Court finding that the warrantless breath test of a person accused of boating while intoxicated violated that state's constitution. (Citing *State v. Pettijohn* (Iowa 2017) 899 N.W.2d 1 (*Pettijohn*).) When a water patrol officer stopped Pettijohn's boat for a moving violation, the officer observed Pettijohn had bloodshot eyes, was nervous, and avoided eye contact with the officer. (*Id.* at pp. 9–10.) Another officer arrived and administered a field sobriety test, which Pettijohn failed. Pettijohn was arrested and taken to a police station where he was handed a "form entitled 'Implied Consent Advisory' in order to inform him of the consequences of failing a breath test or refusing to consent to a breath test," which Pettijohn signed. (*Id.* at p. 10.) Pettijohn agreed to provide a breath sample, and later moved to suppress the results of that test. (*Ibid.*) The Iowa Supreme Court determined there was no violation of the U.S. Constitution because the warrantless breath test was lawful under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. (*Id.* at pp. 18–19.) The *Pettijohn* court concluded that the officers had nonetheless violated Pettijohn's rights under the Iowa Constitution's Fourth-Amendment-equivalent. In finding a state constitutional violation the court pointed to factors to support its conclusion that Pettijohn's consent was involuntary, including: Pettijohn was intoxicated; he was under arrest and at a police station; the implied consent advisory did not inform him of his constitutional right to refuse a warrantless search; and the advisory's language "suggested he had *no* affirmative right to refuse to consent." (*Id.* at pp. 32–34.)

Of course, we are not bound by an authority from another state. And *Pettijohn* is readily distinguishable. The discussion defendant relies on interpreted the Iowa Constitution, and the admonition given while in the "inherently coercive" environment of a police station suggested he had no affirmative right to refuse the test. (*Pettijohn*, *supra*,

899 N.W.2d at pp. 32–33.) By contrast, defendant here was in a hospital, was asked to provide a blood sample, and was not informed he had no right to withhold consent.

Defendant points to dictum in *Harris*, *supra*, 234 Cal.App.4th 671. There, the appellate court determined Harris had voluntarily consented to a warrantless blood draw where he received an admonition in substantial compliance with the implied consent law, never refused to take a test, and did not resist the officer or phlebotomist during the blood draw. (*Id.* at pp. 690–691.) Harris had argued on appeal that "submission to a blood draw, given only after admonition by the police pursuant to California's implied consent law, can never (or almost never) be considered valid consent under the Fourth Amendment because submission is extracted under the threat of serious consequences for refusal." (*Id.* at p. 686.) In rejecting that argument (consistent with the weight of authority), the *Harris* court quoted the Oregon Supreme Court: " '[A]dvising a defendant of the lawful consequences that may flow from his or her decision to engage in a certain behavior ensures that that defendant makes an informed choice whether to engage in that behavior or not. Indeed, the *failure* to disclose accurate information regarding the potential legal consequences of certain behavior would seem to be a more logical basis for a defendant to assert that his or her decision to engage in that behavior was coerced and involuntary.' " (*Harris*, at p. 689, quoting *State v. Moore* (Or. 2013) 318 P.3d 1133, 1138.)

Harris does not compel a different result here, as neither it nor the quoted out-of-state authority involved situations where an admonition had not been provided. (*California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043 ["It is axiomatic that cases are not authority for propositions that are not considered."].) While the failure to admonish may be a logical basis for asserting involuntariness in the abstract, we have already discussed the reasons we find the totality of the circumstances present in this case supports the finding that defendant's consent to the blood draw was voluntary.

3. Failure to Admonish Regarding Implied Consent Law

Defendant argues that his consent was involuntary because the officer did not read him the admonitions outlined in Vehicle Code section 23612. He states he "believes that consent can never be freely or voluntarily given under the Fourth Amendment unless an arresting officer follows the requirements of the Implied Consent Law," essentially arguing that failure to provide the admonitions renders any consent involuntary per se. Similar arguments have been rejected because the adequacy of admonitions is merely one factor to consider in assessing the totality of the circumstances. (*Ling*, *supra*, 15 Cal.App.5th Supp. at p. 11 [failure to properly admonish "will undercut such an assertion of consent," but consent depends on "consideration of the totality of all the circumstances"]; *Schneckloth*, *supra*, 412 U.S. at p. 227 ["While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."]; accord *Balov*, *supra*, 23 Cal.App.5th at p. 703.)

Defendant alternatively contends that even under the totality of the circumstances, the failure to admonish rendered his consent involuntary because he "was not made aware of *any* of the consequences of his actions." But defendant consented to the officer's request for a blood draw without asking any questions or showing any signs that he might refuse.[1] The officer testified that he did not see the need to provide any admonitions because defendant had already agreed to the blood draw. While it is always preferable to give the admonitions to ensure a suspect understands what he or she is agreeing to, they are not constitutionally mandated and the officer's failure to provide them did not make defendant's consent involuntary. As we have determined that the lack

[1] Defendant's affirmative consent to the blood test here distinguishes this case from *Munro v. Department of Motor Vehicles* (2018) 21 Cal.App.5th 41, 44, where a different panel of this court reversed an administrative per se license suspension determination because the officer failed to provide the required admonition despite the driver's indication that he would refuse post-arrest chemical testing.

of implied consent admonitions did not render defendant's consent involuntary, defendant's argument that his trial counsel was ineffective for not arguing that point more forcefully also fails.

B. CONCEDED SENTENCING ERRORS

The parties agree that the abstract of judgment must be amended to stay one felony conviction and one misdemeanor conviction under Penal Code section 654. Penal Code section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

For the single act of driving his motorcycle while intoxicated, defendant was convicted of two felonies—counts 1 and 2—which are alternative charges of driving under the influence with a prior DUI conviction. (Veh. Code, §§ 23152, 23550.5, subd. (a).) At the sentencing hearing, the court stated the four-year sentence it imposed for count 2 "will be run con -- I'm sorry -- it will be stayed pursuant to Penal Code Section 654." But both the sentencing minute order and the abstract of judgment list count 2 as running concurrent to count 1. We will order the abstract of judgment and sentencing minute order modified to reflect the trial court's oral pronouncement of judgment staying the sentence for count 2.

For the single act of driving with a suspended or revoked license, defendant was convicted of two misdemeanors—counts 3 and 4. (Veh. Code, §§ 14601.2, subd. (a); 14601.5, subd. (a).) At the sentencing hearing, the court stated: "As to the misdemeanor charges in Counts 3 and 4, ... I will impose a six-month county jail sentence concurrent to the prison term." The sentencing minute order reflects a six-month concurrent sentence for each misdemeanor conviction. The parties agree that the sentence on one of the misdemeanors should have been stayed under Penal Code section 654. We will order the sentencing minute order amended to stay sentence for count 4.

III. DISPOSITION

The judgment is modified to stay the sentences for counts 2 and 4. (Pen. Code, § 654.) The trial court is directed to prepare an amended abstract of judgment and an amended sentencing minute order reflecting those modifications, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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Grover, J.

WE CONCUR:

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Premo, Acting P. J.

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Mihara, J.